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No.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

RAYMOND S. KAPLAN,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA, FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity and FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Independence Bank, ALAN E. ROBBINS, MARINA EAST HOLDING PARTNERSHIP, a California partnership, WARREN BRESLOW, individually and as Trustee of the Warren L. Breslow Trust, JONA GOLDRICH, individually and as Trustee of the Goldrich No. 1 Trust, JEROME H. SNYDER, SOL KEST, individually and as Trustee of the Kest Trust No. 1, MILTON I. SWIMMER, CHANNEL GATEWAY, L.P., a California limited partnership, SNYDER MARINA ENTERPRISES, a California limited partnership,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the discretionary function exception in 28 U.S.C. § 2680(a) apply when the alleged tortious conduct also violates the plaintiff's constitutional rights?

2. Does the "committed to agency discretion" exception in 5 U.S.C. § 701(a)(2) apply when the challenged agency action also violates the plaintiff's constitutional rights?

3. Is it proper for a district court to decide the applicability of 28 U.S.C. § 2680(a), 5 U.S.C. § 701(a)(2) and 28 U.S.C. § 2680(h) on a motion to dismiss pursuant to Rule 12(b)(1), F.R.Civ.P., without giving plaintiff at least one opportunity to amend the complaint to allege the facts which would defeat these affirmative defenses?

## PARTIES TO THE PROCEEDINGS

Petitioner RAYMOND S. KAPLAN ("petitioner") is a general and limited partner of respondent SNYDER MARINA ENTERPRISES ("SME"), which in turn is a general partner of respondent CHANNEL GATEWAY L.P. ("CHANNEL GATEWAY"). He also is one of the two partners of non-party WLB-RSK VENTURE ("VENTURE"), which became the limited partner of CHANNEL GATEWAY in September, 1992. Petitioner alleged he is a successor in interest to VENTURE by reason of its dissolution in August, 1995. *See* Calif. Corp. Code §15037.

Respondent FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC") is an agency of respondent United States. Petitioner sued that agency in its corporate capacity ("FDIC/C") and as Receiver for Independence Bank ("FDIC/R").[1] Respondent MARINA EAST HOLDING PARTNERSHIP ("MEHP") is a California partnership, of which respondent ALAN E. ROBBINS ("ROBBINS") owns the controlling interest. ROBBINS was a member of the California Senate before he resigned in November 1991, a month before pleading guilty to federal racketeering and tax evasion charges. Respondents JONA GOLDRICH ("GOLDRICH"), SOL KEST ("KEST") and WARREN L. BRESLOW ("BRESLOW") (each as the Trustee of a family trust), and JEROME H. SNYDER ("SNYDER") and MILTON I. SWIMMER ("SWIMMER") (as individuals) are partners in SME.

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[1] On January 30, 1992, the California Superintendent of Banks ordered non-party Independence Bank closed and tendered the appointment as Receiver of that bank to FDIC. The FDIC accepted that appointment.

## TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW ..... i

PARTIES TO THE PROCEEDINGS ..... ii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTES INVOLVED ..... 1

STATEMENT OF THE CASE ..... 2

PROCEDURAL HISTORY ..... 8

REASONS FOR GRANTING THE WRIT ..... 11

A. The Court of Appeals' Affirmance of the Dismissal on the Basis of the Agency Discretion Exception of the APA and the Discretionary Function Exception of the FTCA Is Contrary to The Decision of This Court and the Courts of Appeals That Those Exceptions Do Not Apply to Conduct Which Also Violates the Plaintiff's Constitutional Rights ..... 12

1. The First Four Claims for Relief Are Not Barred by §701(a)(2) ..... 12

2. The Fifth Claim for Relief Is Not Barred By § 2680(a) ..... 19

B. The Court of Appeals' Affirmance of the Dismissal of the Fifth Claim for Relief Based On § 2680(h) Was Erroneous As A Matter Of Law ..... 24
C. The Complaint Should Not Have Been Dismissed Without Leave to Amend ..... 25

CONCLUSION ..... 26

APPENDIX A ..... A-1
Order Granting Motion to Dismiss, Filed January 22, 1997

APPENDIX B ..... B-1
Memorandum Decision, Filed October 14, 1998

APPENDIX C ..... C-1
Order denying Petition for Rehearing, Filed December 29, 1998

APPENDIX D ..... D-1
5 U.S.C. § § 701 and 702

APPENDIX E ..... E-1
28 U.S.C. § 2680

## TABLE OF AUTHORITIES

**PAGE**

**CASES:**

*Armendariz v. Penman,*
75 F.3d 1311 (9th Cir., 1996) ..... 21

*Armstrong v. United States,*
364 U.S. 40 (1960) ..... 17-18

*Berkovitz v. United States,*
486 U.S. 531 (1988) ..... 2, 11, 20

*Bowen v. Massachusetts,*
487 U.S. 879 (1988) ..... 13

*Bowen v. Michigan Academy of Family Physicians,*
476 U.S. 667 (1986) ..... 16

*Carlson v. Green,*
446 U.S. 14 (1980) ..... 19

*Carlylse v. United States,*
674 F.2d 554 (6th Cir., 1992) ..... 18

*CHoPP Computer Corp. v. United States,*
5 F.3d 1344 (9th Cir., 1993), *cert. denied,*
513 U.S. 811 (1994) ..... 20

*Community Action of Laramie County, Inc. v. Bowen,*
866 F.2d 347 (10th Cir., 1989) ..... 17

*Conley v. Gibson,*
355 U.S. 41 (1957) ..... 12

*deVries v. Brumback* ,
(1960) 53 Cal.2d 643, 349 P.2d 532 ..... 25

*Doe v. United States,*
58 F.3d 494 (9th Cir., 1995). ..... 12, 25

*Dubbs v. C.I.A.,*
866 F.2d 1114 (9th Cir., 1989) ..... 16

*Ellison v. Connor,*
153 F.3d 247 (5th Cir., 1998) ..... 17

*Executive Business Media v. U.S. Department of Justice,*
3 F.3d 759 (4th Cir., 1993) ..... 15

*F.D.I.C. v. Bank of Coushatta,*
930 F.2d 1122 (5th Cir.), *cert. denied,*
502 U.S. 857 (1991) ..... 17

*F.D.I.C. v. Meyer,*
510 U.S. 471 (1994) ..... 14

*Garcia v. U.S.,*
896 F.Supp. 467 (E.D. Pa., 1995) ..... 19

*Harlow v. Fitzgerald,*
457 U.S. 800 (1982) ..... 22

*Hinton v. Pacific Enterprises,*
5 F.3d 391 (9th Cir., 1993), *cert. denied,*
511 U.S. 1083 (1994) ..... 25

*Johnson v. Robison,*
415 U.S. 361 (1974) ..... 16

*Local 2855 AFGE (AFL-CIO) v. United States,*
602 F.2d 574 (3rd Cir., 1979) ..... 17

*Marshall v. Kleppe,*
637 F.2d 1217 (9th Cir., 1980) ..... 23

*Marshall Leasing, Inc. v. United States,*
893 F.2d 1096 (9th Cir., 1990) ..... 13

*National Fed'n. of Fed. Employees v. Greenberg,*
983 F.2d 286 (D.C. Cir., 1993) ..... 16

*Nat'l. Union Fire Ins. Co. v. United States,*
115 F.3d 1415 (9th Cir., 1997), *cert. denied,*
__U.S. _, 118 S.Ct. 1053 (1998) ..... 18

*Nottingham, Ltd. v. United States,*
741 F.Supp. 1447 (C.D. Cal., 1990) ..... 19

*Ness Investment Corp. v. U.S. Dept. of Agriculture,*
512 F.2d 706 (9th Cir., 1975) ..... 16

*Rhoden v. U.S.,*
55 F.3d 428 (9th Cir., 1995) ..... 19

*Scheuer v. Rhodes,*
416 U.S. 232 (1974) ..... 2

*Sheldon v. United States,*
7 F.3d 1022 (Fed. Cir., 1993) ..... 18

*Smith v. Allen* ,
(1968) 68 Cal.2d 93, 436 P.2d 65 ..... 24

*Socialist Workers Party v. Attorney General of the United States,*
642 F.Supp. 1357 (S.D.N.Y., 1986) ..... 21

*Stewart v. United States,*
199 F.2d 517 (7th Cir., 1952) ..... 18

*The Presbyterian Church (U.S.A.) v. United States,*
870 F.2d 518 (9th Cir., 1989) ..... 13

*United States v. City of Philadelphia,*
482 F.Supp. 1248 (E.D. Pa., 1979),
*aff'd.* 644 F.2d 187 (3rd Cir., 1980) ..... 15

*United States v. District of Columbia,*
897 F.2d 1152 (D.C. Cir., 1990) ..... 16, 17

*United States v. Mattson,*
600 F.2d 1295 (9th Cir., 1979) ..... 15

*U.S. Fidelity & Guaranty Co. v. United States,*
837 F.2d 116 (3rd Cir), *cert. denied,*
487 U.S. 1235 (1988) ..... 21

*Webster v. Doe,*
486 U.S. 592 (1988) ..... 11, 14, 16, 18

*Wong Wing Fai Co., SA v. United States,*
840 F.2d 1462 (9th Cir., 1988) ..... 21

*Wood v. Strickland,*
420 U.S. 308 (1975) ..... 21

**Federal Statutes**

5 U.S.C. § 701(a) ..... 20
5 U.S.C. § 702 ..... 8, 9
5 U.S.C. § 702(a)(2) ..... 8, 9, 11,12, 13
12 U.S.C. §1819(b)(2)(A) ..... 12
12 U.S.C. §1819(a) ..... 14
28 U.S.C. §§516-518 ..... 14, 15
28 U.S.C. § 1331 ..... 12
28 U.S.C § 2680(a) ..... 9, 11, 14, 20, 21
28 U.S.C § 2680(h) ..... 9, 12, 23, 24
28 U.S.C § 2680(k) ..... 25
28 U.S.C. §1346(b) ..... 14
28 C.F.R. § 0.160-0.172 ..... 14, 15
50 U.S.C. §403(c) ..... 16
F.R. Civ. P. Rule 11 ..... 23
F.R. Civ. P. Rule 12(b)(1)(6) ..... 9, 25
F.R. Civ. P. Rule 23 ..... 23
F.R. Civ. P. Rule 37 ..... 23
U.S.D.C. (CD Cal.) Local Rule 7.16 ..... 25

## State Statutes

California Civil Code § 1661 ..... 24
California Civil Code § 1710 ..... 4
California Civil Code § 3439 ..... 8, 13
California Civil Code § 3439.04(a)(b) ..... 8
California Civil Code § 3439.05 ..... 8
California Commercial Code § 2848 ..... 4
California Commercial Code § 9504 ..... 4, 22
California Commercial Code § 9507 ..... 22
California Corporations Code §15025(2)(c) ..... 19

## Other Authorities

5B. Witkin, *Summary of California Law*, "Torts," §610 (9th ed., 1988) ..... 24

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on October 14, 1998.

## OPINIONS BELOW

The District Court's unreported decision is reproduced as Appendix A. The Court of Appeals' unreported Memorandum Decision is reproduced as Appendix B. The Court of Appeals' Order denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is reproduced as Appendix C.

## JURISDICTION

The Court of Appeals' judgment was entered on October 14, 1998. A timely petition for rehearing was denied on December 29, 1998, and this petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The relevant statutes are sections 701 and 702 of the Administrative Procedure Act, 5 U.S.C. §§ 701 and 702, and that part of the Federal Tort Claims Acts found at 28 U.S.C. § 2680. They are reproduced in Appendices D and E, respectively.

## STATEMENT OF THE CASE[2]

Before March, 1989, MEHP owned certain property in Marina Del Rey, California. CHANNEL GATEWAY was formed on March 30, 1989. MEHP became its limited partner and contributed the property (and rights to acquire other parcels) to that partnership. MEHP's initial capital account was supposed to equal the costs it had incurred to acquire and develop the contributed property less the outstanding encumbrances CHANNEL GATEWAY assumed as part of the transaction. However, MEHP and ROBBINS misrepresented the amount of those costs, with the result that its initial capital account was inflated by approximately $7 million. MEHP and ROBBINS thus fraudulently obtained a $7 million secret profit at the expense of CHANNEL GATEWAY and its partners, including petitioner. MEHP and ROBBINS also fraudulently concealed that ROBBINS previously had engaged in numerous acts of (a) political corruption and other illegal activities[3] and

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[2] The Statement of Facts is drawn from the complaint's allegations because the lower court dismissed this case at the pleading stage. *See, Berkovitz v. United States*, 486 U.S. 531, 540 (1988). The allegations should be construed favorably to petitioner. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

[3] He ultimately pleaded guilty to felony racketeering and income tax evasion charges (for which he was sentenced to five years and ordered to pay $475,000 in fines and restitution). *United States v. Robbins*, Case No. CR-S-91-514-EJG (E.D. Cal.).

(b) financial institution fraud.[4]

In July 1989, MEHP borrowed $2.6 million from Sumitomo Bank and assigned its CHANNEL GATEWAY limited partnership interest to that bank as collateral. Sumitomo Bank required ROBBINS, GOLDRICH and SNYDER to personally guarantee the loan. In March, 1990, ROBBINS borrowed $3.38 million from Independence Bank. The proceeds were used to pay off a $2.88 million personal loan ROBBINS previously had obtained from that bank, prepaid interest and finance charges on the new loan, and ROBBINS' other personal tax liabilities and obligations. Even though MEHP was not the borrower, ROBBINS assigned its CHANNEL GATEWAY limited partnership interest to Independence Bank as collateral for this loan as well.[5]

In July 1991, Sumitomo Bank refused to extend the due date of its loan and demanded that either MEHP pay the outstanding balance or that ROBBINS, GOLDRICH and/or SNYDER honor their guarantees. When neither MEHP nor ROBBINS paid what was due, GOLDRICH and SNYDER honored their guarantees and paid the full amount. In exchange, Sumitomo Bank assigned its rights under the MEHP loan and security interest to them. As a result, GOLDRICH and SNYDER replaced Sumitomo Bank as the senior secured

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[4] He pleaded guilty to three more felony charges (for which he was sentenced to prison for 18 months and ordered to pay $3.38 million to the United States). *United States v. Robbins*, Case No. CR-92-971-RMT (C.D. Cal.).

[5] Independence Bank knew about the Sumitomo loan and agreed its security interest would be junior to Sumitomo Bank's, thereby assuming the rights and risks of any junior lien holder.

party. Calif. Civ. Code § 2848. Independence Bank remained the junior lien holder, having the same rights and risks as before.

On July 17, 1991, GOLDRICH and SNYDER sent MEHP, ROBBINS and Independence Bank a Notice of Sale of the limited partnership interest pursuant to Calif. Comm. Code § 9504. The Notice announced their intention to sell the interest at a private sale to be held after the statutory period expired. Because they knew of CHANNEL GATEWAY's secret profit claim against MEHP, the Notice stated that CHANNEL GATEWAY was claiming a $7 million offset against the interest being sold.[6] MEHP filed for relief under Chapter 11 of the Bankruptcy Code, automatically staying the sale. GOLDRICH and SNYDER obtained relief from the stay approximately one year later, and on July 24, 1992, sent another § 9504 Notice of Sale to ROBBINS, MEHP, FDIC/R[7] and the other creditors listed in MEHP's bankruptcy filing.

MEHP filed suit in the Los Angeles Superior Court to, among other things, prevent the sale.[8] That court issued a temporary restraining order and then a preliminary injunction preventing the sale on condition that MEHP post a $1.3 million bond by September 8, 1992. The court denied MEHP's subsequent motion to reduce the bond's amount and MEHP

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[6] GOLDRICH and SNYDER would have committed fraud had they not disclosed the claim's existence. Calif. Civ. Code § 1710. The notice did not say anything about the claim's merits.

[7] By this time, FDIC/R had taken over Independence Bank.

[8] *Marina East Holding Partnership v. Jona Goldrich, et. al.*, Los Angeles County Superior Court No. LC 017 325.

did not post it. The preliminary injunction did not become effective and the temporary restraining order expired on September 8. Although it had had notice of the sale and of the state court proceedings,[9] the FDIC/R waited until after MEHP's motion to reduce the bond was denied before applying for its own temporary restraining order. The court denied that application but set a hearing on the alternative application for a preliminary injunction for September 25, 1992. Because there was no order preventing the sale from going forward after MEHP's TRO expired or September 8, the sale was held on September 9, 1992.

VENTURE was the only entity willing to buy the interest subject to CHANNEL GATEWAY's claimed offset, and GOLDRICH and SNYDER sold the interest to that partnership (composed of petitioner and BRESLOW). That sale extinguished FDIC/R's junior lien. The CHANNEL GATEWAY partnership agreement was amended to reflect VENTURE's acquisition of the limited partnership interest.

Almost two years later, FDIC/R sued CHANNEL GATEWAY, SME, GOLDRICH, SNYDER, BRESLOW, VENTURE and petitioner in the district court, alleging the sale was invalid and/or voidable because it had not been conducted in a commercially reasonable manner and/or was a fraudulent transfer of the interest to insiders.[10] FDIC/R sought to set the

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[9] It also was a defendant. In addition, GOLDRICH and SNYDER had communicated with Independence Bank and FDIC/R during the preceding year to find out if either was interested in redeeming the collateral to protect their position. Neither expressed an interest in doing so.

[10] *Federal Deposit Insurance Corp., etc. v. Jona Goldrich, et. al.*, Case No. ED CV 94-212-RT (C.D., Cal.).

sale aside so the Independence Bank lien would be resurrected and FDIC/R then would be able to enforce that lien to collect the $3.38 million restitution obligation ROBBINS had undertaken as part of his guilty plea several months earlier.[11]

The defendants spent over $800,000 defending the lawsuit (and MEHP's state court lawsuit) during the next year before finally entering into the settlement agreements which are at issue in this case. Petitioner alleged below that employees of the FDIC/R, FDIC/C and the United States coerced, extorted and intimidated[12] the defendants into agreeing to those settlements on terms which ROBBINS and MEHP demanded solely to (a) recover on ROBBINS' $3.38 million restitution obligation and other liabilities to the government and (b) reward him for his cooperation in the litigation and other criminal investigations. Petitioner alleged they did so because ROBBINS insisted that any settlement provide that MEHP be deemed always to have owned the interest to avoid a substantial income tax liability he otherwise would have had. Petitioner alleged the federal employees refused to entertain his alternate settlement proposal because it was unacceptable to ROBBINS. That proposal would have given the government the same economic benefits but did not include MEHP's readmission to CHANNEL GATEWAY.

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[11] See footnote 4, *supra*.

[12] Their tactics included (a) using the United States Attorney's office rather than a private law firm (as is customary) to bring the power and prosecutorial authority of the United States to bear against them and (b) claiming that certain of the CHANNEL GATEWAY defendants had violated federal and state criminal laws in connection with unrelated transactions.

The extortion succeeded. In July, 1995, ROBBINS, MEHP, and the defendants other than petitioner and VENTURE entered into a settlement pursuant to which they agreed, *inter alia*, that (a) the September 1992 sale would be deemed "null and void," (b) MEHP was deemed always to have owned the interest and was given a capital account which did not reflect any reduction for the $7 million secret profit, (c) CHANNEL GATEWAY would pay FDIC/R $1.5 million (which was deemed to be distributions to MEHP), (d) CHANNEL GATEWAY would distribute an additional $2.5 million over the next five years to MEHP or as instructed by the United States Attorney's office, (e) FDIC and the United States would have liens on those distributions so that ROBBINS' restitution obligation would be discharged by monies which if paid at all, should have been paid to MEHP for the benefit of its creditors, and (f) the parties would receive the same economic benefits and perform their obligations even if a court later held the settlement agreement invalid.

The United States and the defendants other than petitioner and VENTURE entered into a separate agreement at the same time, pursuant to which those defendants agreed to (a) perform their obligations under the MEHP settlement agreement, (b) not dispute that the FDIC and/or United States had a valid $3.38 million lien on MEHP's partnership interest, (c) not contest other liens on that interest in favor of the IRS and other federal agencies, (d) guarantee CHANNEL GATEWAY's payments of the MEHP distributions as instructed and not assert any offset based on ROBBINS' or MEHP's previous wrongdoing, and (e) indemnify the FDIC and United States against any claims petitioner might bring against them. In exchange, the United States released its claims against those defendants and assured them that criminal

prosecutions would not be brought by reason of the acts and events alleged in the lawsuits.

Petitioner did not join the settlements because he would not agree to be ROBBINS' partner again in light of ROBBINS' admitted criminal activity and fraud, and would not be a party to agreements which perpetrated a fraud on MEHP's creditors. The settlement agreements were implemented and the CHANNEL GATEWAY partnership agreement was amended over his objection. FDIC/R subsequently dismissed its lawsuit without prejudice to avoid a ruling that the sale had been valid after all.

## PROCEDURAL HISTORY

Petitioner filed his complaint in the district court on March 29, 1996, alleging claims for relief under California's Fraudulent Transfer Act, Civ. Code. § 3439, *et. seq.* against all the respondents. He alleged the MEHP settlement agreement provisions by which money which otherwise should have been distributed to MEHP on account of the partnership interest but which had been paid to the FDIC and would be paid pursuant to the government's instructions (totaling $4 million) should be set aside because they constituted transfers of MEHP's property made with the actual intent to defraud its creditors [Civ. Code § 3439.04(a)]. Alternatively, he alleged those transfers were voidable under Civ. Code § 3439.04(b) and § 3439.05 because MEHP did not receive reasonably equivalent value and was insolvent or rendered insolvent by the transfers. He invoked the district court's subject matter jurisdiction under section 702 of the Administrative Procedure Act, 5 U.S.C. § 702.

Kaplan's fifth claim was against the United States only under the Federal Tort Claims Act. He alleged the settlement agreement provisions by which the 1992 foreclosure sale was deemed to be null and void worked a conversion of the limited partnership interest which VENTURE had owned since September 9, 1992; that the United States was liable for the resulting damages because its agents and employees had conspired with the other defendants in converting that asset; and that those damages equaled the value of the interest on the date of the conversion because VENTURE received no compensation for that property.

On June 17, 1996, the United States and FDIC/C moved to dismiss the complaint pursuant to Rule 12(b)(1), F.R.Civ.P. They claimed the court lacked subject matter jurisdiction over the first four claims by reason of the "agency discretion" exception [5 U.S.C. § 701(a)(2)] to the waiver of sovereign immunity in 5 U.S.C. § 702. They also argued the district court lacked subject matter jurisdiction over the fifth claim by reason of the discretionary function exception in 28 U.S.C. § 2680(a) and/or the interference with contract rights exception in 28 U.S.C. § 2680(h).[13]

On January 23, 1997, the district court granted the motion and dismissed the complaint as to the United States and FDIC/C with prejudice without giving petitioner an opportunity to amend his complaint to allege facts which would

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[13] On June 14, 1996, MEHP and ROBBINS moved to dismiss the complaint under Rule 12(b)(6). On July 18, 1996, the FDIC/R filed a motion to dismiss under Rule 12(b)(1). The district court did not decide these motions because it granted the United States' motion and then dismissed the balance of the case without prejudice on its own motion for want of subject matter jurisdiction.

meet those affirmative defenses. The court issued an Order to Show Cause why the complaint should not be dismissed as to the other defendants in light of that ruling. Petitioner unsuccessfully moved for reconsideration of that part of the January 23 Order which denied him leave to amend. The district court dismissed the complaint as to the remaining defendants without prejudice on March 31, 1997.

Petitioner timely appealed to the Court of Appeals for the Ninth Circuit. After the briefs and excerpts of record were filed, the appeal was scheduled for oral argument on October 8, 1998. The United States and FDIC/R moved to reschedule the oral argument because their assigned counsel was unavailable. Petitioner did not oppose that motion, and by Order filed September 25, 1998, the hearing date was vacated and the parties were advised a new hearing date would be scheduled.

Without warning, on October 13, 1998, the Court of Appeals ordered the appeal submitted as of October 8, 1998, without oral argument. The Court did not notify the parties of its intent to dispense with oral argument, as required by Ninth Circuit Rule 34-4(c), before it did so. The next day (before petitioner received the October 13 Order), the Court of Appeals filed its Memorandum decision summarily affirming the district court's dismissal of petitioner's action. The Court did not state any reasons for its decision nor did it cite any cases to give the parties a hint as to those reasons. Petitioner timely filed a petition for rehearing and suggestion for hearing *en banc*. That petition was denied and the suggestion for hearing *en banc* was rejected by Order dated December 29, 1998.

## REASONS FOR GRANTING THE WRIT

This petition should be granted so this Court can make clear that the principle announced in *Webster v. Doe*, 486 U.S. 592 (1988) applies to lawsuits brought under the FTCA. In that case, this Court held the "committed to agency discretion" exception to the waiver of sovereign immunity contained in 5 U.S.C. § 701(a)(2) did not apply to conduct which violated the plaintiff's constitutional rights. The exception to the FTCA's waiver of sovereign immunity set forth in 28 U.S.C. § 2680(a) similarly should not apply when the alleged wrongful conduct also violates the plaintiff's constitutional rights.

In *Berkovitz v. United States*, 486 U.S. 531 (1988), this Court held that § 2680(a) would not apply "when a federal statute, regulation, or policy specifically prescribes a course of action for [the] employee to follow [because] the employee has no rightful option but to adhere to the directive." 486 U.S. at 536-37. This Court did not have occasion to include the Constitution in that list of directives because the plaintiff in that case did not allege the conduct violated his constitutional rights.

In this case, petitioner alleged (and could have alleged had he been given leave to amend) conduct which violated the due process and takings clauses of the Fifth Amendment as well as the claims alleged under California law. The Court of Appeals erred when it summarily affirmed the district court's dismissal of petitioner's claims on the basis of the "committed to agency discretion" exception in § 701(a)(2) and the discretionary function exception in § 2680(a) because those exceptions do not apply to conduct which also violates the plaintiff's constitutional rights. The Court of Appeals also erred

when it summarily affirmed the district court's invocation of the interference with contracts exception in 28 U.S.C. § 2680(h) because the alleged acts constituted conversion as a matter of law under California law. The Court of Appeals compounded its error by not reversing the district court's refusal to give petitioner leave to amend his complaint to allege the facts which, if proved, would have defeated those affirmative defenses. *Cf., Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Doe v. United States*, 58 F.3d 494, 496 (9th Cir., 1995).

**A. The Court of Appeals' Affirmance of the Dismissal on the Basis of the Agency Discretion Exception of the APA and the Discretionary Function Exception of the FTCA Is Contrary to The Decisions of This Court and the Courts of Appeals That Those Exceptions Do Not Apply to Conduct Which Also Violates the Plaintiff's Constitutional Rights.**

**1. The First Four Claims for Relief Are Not Barred By § 701(a)(2).**

Petitioner alleged the district court had subject matter jurisdiction over his first four claims for relief as to the United States, FDIC/C and FDIC/R under 12 U.S.C. § 1819(b)(2)(A) and 28 U.S.C. § 1331 because they alleged claims cognizable under California law against those defendants, among others.[14] Sovereign immunity did not bar those claims because of the waiver for non-money damages claims in the second sentence of § 702 of the Administrative Procedure Act, 5 U.S.C. § 702:

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[14] It had subject matter jurisdiction as to the other defendants under 28 U.S.C. § 1367.

> "An action . . . seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States. . . ."

*See, Bowen v. Massachusetts*, 487 U.S. 879 (1988) [Declaratory relief action to set aside agency orders disallowing Medicaid reimbursements which if successful, would require reimbursement]; *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096 (9th Cir., 1990) [Action for return of automobile seized by DEA in forfeiture proceeding]; *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir., 1989).[15] The claims were within this waiver because they sought non-monetary relief under Calif. Civ. Code § 3439 *et. seq.*: a judgment avoiding the past transfers of the distributions under the CHANNEL GATEWAY partnership agreement as amended in 1995 and an injunction against such transfers being made in the future.

The Court of Appeals summarily affirmed the district court's holding that it lacked subject matter jurisdiction over these claims notwithstanding § 702 because of 5 U.S.C. § 701(a)(2), which precludes judicial review "to the extent that. .

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[15] Petitioner has not found any decisions specifically on the issue of whether this waiver covers fraudulent transfer claims. However, the cited decisions hold that it covers similar types of equitable claims for the return of property or reimbursement of money.

. agency action is committed to agency discretion by law."[16] The district court so held because it concluded that the manner in which the FDIC/R structured the settlement (to ensure payment of ROBBINS' criminal restitution obligation by way of the payment to the government of partnership distributions otherwise due MEHP) was committed to its discretion by 12 U.S.C. § 1819(a) and to the discretion of the Department of Justice (DOJ), which was representing the FDIC/R, by 28 U.S.C. §§ 516-518, 28 C.F.R. §§ 0.160-0.172 and § 5 of Executive Order 6166.

These holdings were incorrect as a matter of law. The only possibly applicable part of 12 U.S.C. § 1819(a) is the Fourth proviso, which grants the FDIC the power "[t]o sue and be sued . . . by and through its own attorneys, in any court of law or equity, State or Federal." In *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994), this Court held that "sue and be sued" clauses such as § 1819(a) Fourth are nothing more than waivers of sovereign immunity. 510 U.S. at 480-81. The statute says nothing about the FDIC's discretion in choosing the terms on which it settles cases. *Compare, Webster v. Doe*, *supra*: The language of 50 U.S.C. § 102(c)[17] "fairly exudes deference to the Director. . . ." 486 U.S. at 600.

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[16] The district court also held that 28 U.S.C. § 2680(a) barred these claims. This was plain error because only claims for money damages are cognizable under the FTCA. 28 U.S.C. § 1346(b). Thus, § 2680(a) does not even come into play.

[17] "[T]he Director . . . may, *in his discretion*, terminate the employment of any officer or employee. . . *whenever he shall deem* such termination necessary or advisable in the interests of the United States. . . ." (emphasis added).

28 U.S.C. §§ 516-519 also do not speak to agency discretion. They were enacted as part of the 1966 executive branch reorganization to transfer the responsibility of representing the United States and its agencies from the agencies to the DOJ unless another statute provided otherwise. *United States v. Mattson*, 600 F.2d 1295, 1297, n.1 (9th Cir., 1979) [§ 516 "serves merely as a housekeeping provision which authorizes the Attorney General to bring an action where there is independent statutory authority"]; *United States v. City of Philadelphia*, 482 F.Supp. 1248, 1258 (E.D. Pa., 1979), *aff'd.*, 644 F.2d 187 (3rd Cir., 1980) [§ 518 a "housekeeping statute" pertaining to the internal organization of the federal government]. Section 5 of Executive Order No. 6166 does nothing more than confirm that fact. The cited regulations (28 C.F.R. §§ 0.160-0.172) simply prescribe settlement authority levels.

None of these statutes and regulations gives the FDIC or DOJ *carte blanche* as to the terms on which it can settle cases. In *Executive Business Media v. U.S. Department of Justice*, 3 F.3d 759 (4th Cir., 1993), the government argued that § 5 of Executive Order 6166 gave the DOJ such wide latitude in deciding the terms on which to settle cases that a disappointed bidder could not challenge a settlement agreement on the ground it did not comply with statutory competitive bidding requirements. The Fourth Circuit disagreed, stating:

> "[P]lenary power means absolute authority to pursue legitimate objectives and does not include license to agree to settlement terms that would violate the civil laws governing the agency . . . the Attorney General in representing a government agency is bound by the

> same laws that control the agency. . . We think it alien to our concept of law to allow the chief legal officer of the country to violate its laws under the cover of settling litigation. The Attorney General's authority to settle litigation for its government clients stops at the walls of illegality." 3 F.3d at 762.

The "walls of illegality" include the Fifth Amendment. In *Webster v. Doe, supra*, this Court held that an employment termination decision by the Director of the CIA under § 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c), while otherwise immune from judicial review by reason of § 701(a)(2), nevertheless was subject to such review if the plaintiff alleged the agency's action violated his constitutional rights. 486 U.S. at 603-04. This Court rejected the government's argument that "all Agency employment termination decisions, even those based on policies normally repugnant to the Constitution, are given over to the absolute discretion of the Director, and are hence unreviewable under the APA." *Id.*, at 603. *See also, Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, n. 12 (1986) and *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974), in which this Court rejected the government's argument that actions committed to agency discretion were immune to judicial review for alleged constitutional violations.

The lower court's ruling also is contrary to decisions of its own circuit, *Dubbs v. C.I.A.*, 866 F.2d 1114, 1119-20 (9th Cir., 1989); *Ness Investment Corp. v. U.S. Dept. of Agriculture*, 512 F.2d 706, 715 (9th Cir., 1975) and of other circuits, *National Fed'n. of Fed. Employees v. Greenberg*, 983 F.2d 286, 289-90 (D.C. Cir., 1993); *United States v. District of*

*Columbia*, 897 F.2d 1152, 1158 (D.C. Cir., 1990); *Ellison v. Connor*, 153 F.3d 247, 254 (5th Cir., 1998); *F.D.I.C. v. Bank of Coushatta*, 930 F.2d 1122, 1130 (5th Cir.), *cert. denied*, 502 U.S. 857 (1991); *Local 2855 AFGE (AFL-CIO) v. United States*, 602 F.2d 574, 580 (3rd Cir., 1979); *Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347, 352-53 (10th Cir., 1989).

The Fifth Amendment states, in pertinent part, that "[n]o person shall . . . be deprived of . . . property, without due process of law, nor shall private property be taken for public use, without just compensation." Even if MEHP's readmission to the CHANNEL GATEWAY partnership was valid under California law, the subsequent payment of its partnership distributions to the government to satisfy ROBBINS' personal debt was a taking for purposes of the Fifth Amendment. Those distributions were MEHP's property on which its creditors could execute to satisfy their claims against MEHP after those claims were reduced to judgment. Petitioner and others were creditors of MEHP at the time the distributions were paid to the government; therefore property that otherwise would have been available to them was put beyond their reach. It bears repeating that the government was not one of MEHP's creditors. The government was ROBBINS' creditor by reason of the restitution obligation he undertook as part of his guilty plea.

MEHP's creditors occupied the same position *vis á vis* MEHP as the materialmen occupied *vis á vis* the boat builder in *Armstrong v. United States*, 364 U.S. 40 (1960). In that case, this Court held that the materialmen's liens on the boats under construction were property rights protected by the Fifth Amendment even though they had not yet enforced those liens.

362 U.S. at 44. This Court further held that the transfer of the uncompleted boats to the government (pursuant to the contract) when the builder defaulted on the construction contract was a taking under the Fifth Amendment because the government's sovereign immunity made the liens unenforceable after the transfer. *Id.* at 45-49. *See also, Sheldon v. United States*, 7 F.3d 1022 (Fed. Cir., 1993) [mortgage lien a compensable property interest for Fifth Amendment purposes].

Thus, petitioner alleged facts which, if proved, would have established that the settlement agreement provisions by which MEHP's property was transferred to the government to satisfy ROBBINS' personal debt was a taking of property under the Fifth Amendment. Petitioner alleged that MEHP did not receive equivalent value for the transferred distributions, which means that MEHP's creditors did not have an asset to execute on after they obtained judgments against MEHP. If proved, those facts would have brought the claims for relief within the rule announced in *Webster v. Doe*, and they should not have been dismissed at the pleading stage on the basis of § 701(a)(2).

That petitioner did not allege a takings claim in his complaint does not mean the alleged unconstitutionality of the respondents' actions was irrelevant. Whether the exceptions to the waivers of sovereign immunity in the APA and FTCA apply is an affirmative defense, as to which the government has the burden of proof. *Nat'l. Union Fire Ins. Co. v. United States*, 115 F.3d 1415, 1417 (9th Cir., 1997), *cert. denied*, __ U.S. __, 118 S.Ct. 1053 (1998); *Carlylse v. United States*, 674 F.2d 554, 556 (6th Cir., 1992); *Stewart v. United States*, 199 F.2d 517, 520 (7th Cir., 1952). Petitioner had the right to present evidence of the unconstitutional conduct to defeat those

defenses. That the conduct might also support a takings claim does not mean it does not support claims under the APA and FTCA. *See, Carlson v. Green*, 446 U.S. 14, 19-20, 23 (1980); *Rhoden v. U.S.*, 55 F.3d 428, 432, n. 5 (9th Cir., 1995); *Garcia v. U.S.*, 896 F.Supp. 467, 474-75 (E.D. Pa., 1995).

The facts giving rise to these claims illustrate the injustice resulting from their dismissal. In 1990, ROBBINS, not MEHP, borrowed $3.38 million from Independence Bank. ROBBINS did not pledge **his** interest **in** MEHP to secure that loan; he caused MEHP to pledge **its interest in CHANNEL GATEWAY** even though MEHP received no part of the loan. In 1994, as part of his guilty plea, ROBBINS, not MEHP, agreed to repay the $3.38 million (plus interest). Then FDIC/R filed its lawsuit to recover on that obligation. In 1995, federal employees coerced CHANNEL GATEWAY to agree (with MEHP) to pay $4 million of distributions, which otherwise would have been paid to MEHP, to the government to satisfy ROBBINS' restitution obligation. That agreement violated California law, under which partnership assets are not subject to execution to collect judgments entered against partners. California Corp. Code §15025(2)(c). But for that unlawful agreement, the distributions would have been available to satisfy the claims of MEHP's creditors. Thus the government, which was not an MEHP creditor, was paid in full on ROBBINS' debt with MEHP's money and MEHP's creditors were left with nothing against which to satisfy their claims. Neither petitioner nor any other creditor was compensated for this diversion of MEHP's assets.

**2. The Fifth Claim For Relief Is Not Barred By § 2680(a)**

Petitioner's fifth claim was for conversion, which is cognizable under the FTCA. *Nottingham, Ltd. v. United States*, 741 F.Supp. 1447 (C.D. Cal., 1990), cited with approval in *CHoPP Computer Corp. v. United States*, 5 F.3d 1344, 1347 (9th Cir., 1993), *cert. denied*, 513 U.S. 811 (1994).

The Court of Appeals summarily affirmed the district court's ruling that this claim was barred by § 2680(a) because the United States "has power pursuant to statute to make decisions about acceptable terms for settlement of litigation, and such decisions are within [its] sound discretion". [App A-19]. The court cited the same statutes it cited for its holding that § 701(a)(2) barred the first four claims. The Court of Appeals committed the same error it committed with respect to that statute--it ignored decisions of this Court, other Courts of Appeals and its own that § 2680(a) does not immunize acts which also allegedly violate a plaintiff's constitutional rights.

This Court held in *Berkovitz v. United States*, *supra*, that acts which violate statutes, regulations or policy directives are not immunized by § 2680(a):

> "[T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive." 486 U.S. at 536-37.

In *Wood v. Strickland*, 420 U.S. 308 (1975), this Court held that the qualified immunity defense otherwise available to government officials would be defeated by a showing that the official "knew or reasonably should have known that the action he took. . . would violate the constitutional rights" of the plaintiff. 420 U.S. at 322.

Section 2680(a) does not immunize conduct which also violates constitutional prohibitions for the same reason: the Constitution either (a) requires government agents to act in a prescribed manner or (b) prohibits them from taking certain actions. In either case, they do not have the option to ignore or violate constitutional directives. In *Wong Wing Fai Co., SA v. United States*, 840 F.2d 1462, 1470, n. 18 (9th Cir., 1988), the Ninth Circuit stated this rule applied to § 2680(a). In *U.S. Fidelity & Guaranty Co. v. United States*, 837 F.2d 116 (3rd Cir.), *cert. denied*, 487 U.S. 1235 (1988), the Third Circuit stated: "[C]onduct cannot be discretionary if it violates the Constitution, a statute, or an applicable regulation. Federal officials do not possess discretion to violate constitutional rights." 837 F.2d at 120. *See also, Socialist Workers Party v. Attorney General of the United States*, 642 F.Supp. 1357, 1415-17 (S.D.N.Y., 1986).

There is no doubt the Fifth Amendment prohibits the government from depriving citizens of their property without due process of law and taking that property without just compensation. In *Armendariz v. Penman*, 75 F.3d 1311, 1320 (9th Cir., 1996), the Ninth Circuit stated: "[i]t is overwhelmingly clear from more than a century of precedent that the government violates the Constitution when it takes private property for private use, and the bar on such 'private takings' is certainly well-established law for the purposes of"

determining whether a government official has qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and its progeny. If the Fifth Amendment's proscriptions are sufficiently clear that a government official cannot claim qualified immunity when he/she violates them, they are sufficiently clear for purposes of § 2680(a).

VENTURE's due process rights were violated because it never agreed the sale was invalid and no court ever held it was. In fact, the district court had denied a motion for summary judgment that the sale was invalid because not conducted in accordance with Calif. Comm. Code § 9504, which the FDIC/R made in its earlier lawsuit, on the ground that a declaration of invalidity was not an available remedy under Calif. Comm. Code § 9507. VENTURE's right not to be deprived of its property without just compensation was violated because it did not receive any compensation for the loss of its partnership interest.

Petitioner's allegations of the United States' employees' coercion of and involvement in the other respondents' conversion of the interest sufficiently alleges governmental involvement. He alleged, and the district court implicitly found, that the limited partnership interest was taken from VENTURE and given to MEHP for a public use: it was an essential part of the settlement by which the partnership distributions were used to pay ROBBINS' restitution obligation, thereby recovering money for the federal treasury. The FDIC employees who agreed to require the conversion of VENTURE's limited property interest in CHANNEL GATEWAY did not have the discretion to do so because that

violated VENTURE's[18] rights under the Fifth Amendment.

The only considerations of social, economic or political policy identified by the lower court were those associated with the government's right to conduct and settle lawsuits on the terms it determines best serve the public good, specifically to recover monies owed to federally-insured banks. That court confused the means employed by the Federal employees to coerce the conversion with the end result of that conduct. Unlike decisions which truly reflect an agency's balancing of competing economic, social and political concerns and factors, federal courts are quite capable of evaluating litigation tactics and passing on the legality and/or fairness of settlement agreements. They do both routinely. *See, e.g.*, Rules 11, 23 and 37, F.R.Civ.P. Furthermore, section 3-10.120 of the *U.S. Attorney's Manual* (July 1, 1992 ed.), entitled "Standards for Debt Collection Action" states in pertinent part: "All financial litigation action by Department of Justice personnel should meet the highest ethical and professional standards." That agency has an Office of Professional Responsibility which investigates alleged misconduct by AUSA's and recommends disciplinary actions if warranted. 28 C.F.R. § 0.39, *et. seq.* Rule 5-100 of the Rules of Professional Conduct of the California Bar prohibit the type of extortionate threats which petitioner alleged the FDIC's lawyer made to coerce the settlement. Thus directives do exist which restricted the actions which could be taken to settle the case.

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[18] Partnerships are entitled to protection under the Fifth Amendment's due process clause. *Cf. Marshall v. Kleppe*, 637 F.2d 1217 (9th Cir., 1980) [close corporation]. Petitioner sustained a compensable loss when the interest was taken from VENTURE because he owned a 50% partner's interest in the asset.

**B. The Court of Appeals' Affirmance of the Dismissal of the Fifth Claim for Relief Based On § 2680(h) Was Erroneous As A Matter Of Law.**

The district court also ruled this claim was "really a claim for the government's interference with a contract between petitioner and non-government, third parties" [App A-15] and dismissed it because of the exception in 28 U.S.C. § 2680(h). The contract the court referred to was the 1992 amendment to the CHANNEL GATEWAY partnership which recognized VENTURE's acquisition of the partnership interest. The claim is not barred by § 2680(h) because it alleged the conversion of property, not interference with an ongoing contractual relationship. The converted property was the limited partnership interest which VENTURE bought in 1992 and owned in 1995, not its executory rights under the CHANNEL GATEWAY partnership agreement, as amended in 1992 **after** VENTURE acquired the interest. VENTURE acquired the interest pursuant to an assignment from GOLDRICH and SNYDER which was fully performed as of the September 9, 1992 sale. Title to the interest vested in VENTURE at that instant. Calif. Civ. Code § 1661; *Smith v. Allen* (1968) 68 Cal.2d 93, 95-96, 436 P.2d 65. The 1992 amendment simply set forth VENTURE's executory rights and obligations by reason of its acquisition of the interest.

VENTURE's property was converted when the CHANNEL GATEWAY defendants agreed to deem the September 1992 sale null and void. That took the interest away from VENTURE and gave it to MEHP, which is a conversion under California law. 5 B. Witkin, *Summary of California Law*, "Torts," § 610 (9th ed., 1988). The United

States would be liable for the damages sustained as a result of that conversion if petitioner proves government employees conspired with the CHANNEL GATEWAY defendants and ROBBINS to convert the interest. *deVries v. Brumback* (1960) 53 Cal.2d 643, 648-50, 349 P.2d 532.

### C. The Complaint Should Not Have Been Dismissed Without Leave To Amend.

The district court dismissed petitioner's claims without leave to amend because it stated that he could not allege facts which would defeat the defenses.[19] Petitioner timely filed a motion for reconsideration, which was denied on the ground it did not satisfy that court's Local Rule 7.16. The Court of Appeals did not disturb this ruling either.

Under *Hinton v. Pacific Enterprises*, 5 F.3d 391 (9th Cir., 1993), *cert. denied*, 511 U.S. 1083 (1994), the court should have treated the motion as one for leave to amend under Rule 15(a), F.R. Civ. P. The standards applicable to those motions differ than those under Local Rule 7.16. In *Doe v. United States*, *supra*, the district court granted the United States' Rule 12(b)(1) motion to dismiss an FTCA claim without leave to amend after it concluded it did not have subject matter jurisdiction pursuant to 28 U.S.C. § 2680(k) because the

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[19] The court also stated that petitioner had not suggested any such amendments in his opposition to the motion. He did not do so because the motion did not ask for a dismissal with prejudice and petitioner reasonably believed that, given the fact the motion was based solely on the pleadings, the court would give him at least one opportunity to cure any perceived deficiencies.

allegedly wrongful conduct occurred in a foreign country. The Ninth Circuit reversed, holding it was error not to give plaintiff leave to amend:

> "This court has held that 'a motion to dismiss is not a "responsive pleading" within the meaning of the Rule. Neither the filing nor granting of such a motion before answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is improper'. . . 'It is of no consequence that no request to amend the pleading was made in the district court.'" 58 F.3d at 497 (citation omitted)

Because none of the defendants had answered the complaint as of January 23, it was clear error for the lower court to dismiss without leave to amend "'unless the court determine[d] that the pleading could not possibly be cured by the allegation of other facts'" *Id.* Petitioner demonstrated above that the lower court's statement that such was the case was erroneous. That petitioner did not suggest in his opposition to the motion specifically how he could amend to overcome the sovereign immunity defenses is irrelevant. *Id.* He had alleged conduct which, if proved, would have defeated them. He should have been given the opportunity to do so.

## CONCLUSION

This Court should grant certiorari to make clear that the agency discretion exceptions of the APA and FTCA do not apply to conduct which allegedly violates constitutional rights and to determine whether such important and case dispositive decisions should be made at the pleading stage without giving

the plaintiff an opportunity to allege the known facts which would defeat those defenses.

Dated: March 24, 1999.

Respectfully submitted,

JOSEPH L. GOLDEN
*Counsel of Record*

*Attorney for Petitioner*
RAYMOND S. KAPLAN

# APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTICT OF CALIFORNIA

**ENTERED**
Clerk, U.S. District Court
January 23, 1997
Central Division of California
Eastern Division
By Deputy

**FILED**
Clerk, U.S. District Court
January 22, 1997
Central District of California
Eastern Division
By Deputy

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RAYMOND S. KAPLAN,
Plaintiff,
v.
UNITED STATES OF AMERICA; FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity; FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Independence Bank; ALAN E. ROBBINS; MARINA EAST HOLDING PARTNERSHIP, a California limited Partnership; WARREN BRESLOW, individually and as Trustee of the Warren L. Breslow Trust; JONA GOLDRICH, individually and as Trustee of the Goldrich No.1 Trust; JEROME H. SNYDER, SOL KEST, individually and as Trustee of the Kest Trust No. 1, MILTON L. SWIMMER; CHANNEL GATEWAY, L.P., a California limited partnership; SNYDER MARINA ENTERPRISES, a California limited partnership,
Defendants.

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ED CV 96-0159-RT (VAPx)

ORDER GRANTING MOTION TO DISMISS RAYMOND S. KAPLAN'S COMPLAINT BY DEFENDANTS UNITED STATES OF AMERICA AND

FEDERAL DEPOSIT INSURANCE CORPORATION IN ITS CORPORATE CAPACITY

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(D)

Defendants United States of America's (USA's) and Federal Deposit Insurance corporation, in its corporate capacity's (FDIC/C's) motion to dismiss the complaint of Raymond S. Kaplan (Kaplan) (motion) was submitted for decision[1].

The court, the Honorable Robert J. Timlin, has read and considered the moving, opposing and reply papers Based on such consideration, the court concludes as follows:

## I.
## FACTUAL BACKGROUND

On March 29, 1996, Kaplan filed a complaint (subtitled as being for "(1) Declaratory Relief re Fraudulent Conveyances[2]; (2) Imposition of Constructive Trust; and (3)

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[1] This motion was joined in by defendants Alan Robbins (Robbins) and Marina East Holding Partnership (MEHP). However, Robbins and MEHP failed to discuss how the grounds for the USA's and FDIC/C's motion, which involve issues of sovereign immunity, could be applicable to Robbins and/or MEHP. Accordingly, the court's disposition of this motion has no effect on Robbins and MEHP.

[2] Kaplan, in his opposition to Channel Gateway's motion to dismiss, clarifies his "declaratory relief " claims as not seeking declaratory judgments as to the rights and duties of the parties but as having been alleged under

Damages for Conversion against the United States of America (USA); the Federal Deposit Insurance Corporation, in its corporate capacity (FDIC); the Federal Deposit Insurance Corporation, as receiver for Independence Bank (FDIC/R); Alan E. Robbins (Robbins); Marina East Holding Partnership, a California limited partnership (MEHP); Warren Breslow, individually and as trustee of the Warren L. Breslow Trust (Breslow); Jona Goldrich, individually and as trustee of the Goldrich No. 1 Trust (Goldrich); Jerome H. Snyder (Snyder), Sol Kest, individually and as trustee of the Kest Trust No. 1 (Kest), Milton L Swimmer (Swimmer); Channel Gateway, L.P., a California limited partnership (Channel Gateway); and Snyder Marina Enterprises, a California limited partnership (SME) (collectively defendants).

The complaint contains the following factual allegations, among others:

On or about July 7, 1995, in an agreement allegedly effective March 7, 1995, Robbins and MEHP, on the one hand, and Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow on the other hand, entered into a written settlement agreement (the Robbins/MEHP/Channel Gateway settlement agreement) which provided, in relevant part, that:

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California Civil Code section 3439.07. (Unless otherwise specifically stated, all further statutory references will be to the California Civil Code.) He is seeking judgments setting aside transfers of property pursuant to certain agreements discussed infra because they are in violation of sections 3439.04 and 3439.05.

(a) MEHP's limited partnership interest in Channel Gateway was deemed to have continued to exist, despite the purported amendment of the Channel Gateway Partnership Agreement which had replaced MEHP with WLB-RSK Venture as a limited partner in Channel Gateway, and that MEHP has a capital account of $15,200,000 in Channel Gateway;

(b) the foreclosure sale of MEHP's limited partnership interest to WLB-RSK Venture on September 9, 1992 and the 1992 amendment to the Channel Gateway Partnership Agreement related to that sale were null and void, and the Channel Gateway Partnership Agreement would be amended to effectuate the admission of MEHP as the limited partner in place of WLB-RSK Venture and to establish a particular distribution schedule;

(c) Channel Gateway would pay FDIC $875,000 upon execution of the agreement in addition to the $625,000 it earlier was required to pay FDIC to obtain refinancing of the Bank of America loan which was essential to Channel Gateway's existence and further development of the Channel Gateway project even though neither FDIC nor FDIC/R was a signatory to this agreement;

(d) Channel Gateway agreed to distribute to MEHP the sums of $1 million no later than March 1996 and $500,000 each year thereafter for five years, and FDIC and the USA are given liens on any and all distributions to MEHP[3]; and

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[3] According to Kaplan, the result of this provision in the agreement is that the restitution imposed on Robbins

(e) the parties agreed to be bound by the "economic benefits and obligations" of their agreement even if a court later held that it was invalid[4].

Also on or about July 7, 1995, in an agreement allegedly effective March 7, 1995, the USA, on the one hand, and Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow, on the other hand, entered into a separate but related settlement agreement (the USA/Channel Gateway settlement agreement), which provided, in relevant part:

(a) Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow agreed to enter into and perform their obligations under the Robbins/MEHP/Channel Gateway settlement agreement and the amendment to the Channel Gateway Partnership Agreement. In addition, the payments from Channel Gateway to the FDIC of $875,000 and $625,000 referred to in the Robbins/MEHP/Channel Gateway settlement agreement (a total of $1.5 million) were to be made payable to the FDIC/R, in exchange for which

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as a part of his sentence for his criminal conviction of defrauding Independence Bank, which was an obligation personal to Robbins, will be discharged by moneys which, if paid at all, should be paid to MEHP for the benefit of its creditors, including Kaplan.

[4] According to Kaplan, the existence of this provision shows that the parties to the settlement agreement recognized its "fraudulent nature and invalidity."

the USA agreed to dismiss all claims asserted against Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow in Case No. 94-0212 and certain state court litigation;

(b) Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow agreed not to dispute that there was a valid lien on MEHP's newly acquired interest in Channel Gateway in favor of the USA and/or FDIC/R in the total principal amount of $3.38 million, which is the amount of the loan from Independence Bank (Independence) to Robbins. Kaplan alleges that by agreeing to this provision of the USA/Channel Gateway settlement agreement, "said defendants" (Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow, and, apparently, the USA) agreed to participate in the fraud on MEHP's creditors, including Kaplan, which fraud these two settlement agreements perpetrated because, "as all the parties knew, the lien itself was a fraudulent conveyance for the reasons alleged in paragraphs 27 and 28 [of Kaplan's complaint]."[5]

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[5] Those reasons are that in 1990, Robbins borrowed $3.38 million from Independence, which, on information and belief, was one of numerous loans made by Independence to Robbins between 1985 and 1990 without the normal and customary financial review and collateral requirements. The proceeds of the $3.38 million loan were used to repay an earlier loan of $2.88 million borrowed by Robbins from Independence in 1989, plus interest and finance charges on the $3.38 million loan, plus other personal tax liabilities and obligations of Robbins. Although MEHP was not the borrower, Robbins caused MEHP to assign its limited partnership interest in Channel Gateway to Independence as collateral for the $3.38 million loan. On

In addition, Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow agreed not to contest other liens on that interest in favor of the IRS and other federal agencies "all of which [other liens] are to secure the performance of Robbins' personal and individual obligations, even though, as [Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow] and the Federal Defendants"[6] knew, enforcement of said liens is and/or will be a fraud upon MEHP's creditors, including Kaplan;

(c) the USA released all claims against Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow relating to the subject matter of the state and federal cases against them, including claims which the "Federal Defendants" had threatened to bring against them if they did not agree to "the settlement structured to

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information and belief, Kaplan alleges that the assignment of MEHP's limited partnership interest was made with the actual intent to hinder, delay and defraud MEHP's creditors, including but not limited to Kaplan, and, also on information and belief, he alleges that MEHP did not receive equivalent value for the assignment and, at the time the assignment was made, it was engaged in or about to engage in a business or transaction for which its remaining assets were unreasonably small; intended to incur or knew it would incur, debts beyond its ability to repay as they came due; and/or was insolvent and/or became insolvent by reason of that assignment.

[6] The "Federal Defendants" are defined by Kaplan as the USA, FDIC/R and FDIC/C. (Complaint, ¶ 5:9-11.)

preserve Robbins' personal tax benefits;"[7]

(d) Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow agreed to guarantee Channel Gateway's payments of the MEHP distributions referred to above and agreed not to assert any off-set against that guarantee liability based on Robbins' or MEHP's wrongdoing; and

(e) Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow agreed to indemnify and hold harmless the USA, FDIC and FDIC/R from any liabilities, damages, claims, etc. as a result of any claims by, essentially, Kaplan.

The complaint also alleges that Kaplan is a creditor of MEHP within the meaning of California Civil Code section 3439.01 by reason of the fraud perpetrated upon him by MEHP and Robbins, to wit, Robbins' and MEHP's concealment of the cost of the property which MEHP contributed to Channel Gateway in exchange for a limited partnership interest in Channel Gateway and a credit in its initial capital account equal to the cost of the property less the outstanding encumbrances which Channel Gateway assumed, which misrepresentation allowed Robbins and MEHP to obtain a secret profit of $7 million. Kaplan also alleges that he is a creditor of MEHP because of the torts

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[7] Kaplan also alleges on information and belief that Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow received assurances from the Criminal Division of the U.S. Attorney ' s Office that no criminal prosecutions would be brought against them.

and other wrongdoing perpetrated upon him by MEHP in connection with the 1995 settlement agreements and as alleged in a complaint filed by Kaplan against MEHP and others in Los Angeles County Superior Court, Kaplan v. Breslow, et al., LASC No. BC 146720 (the state action).

In addition, the complaint alleges that:

(1) the FDIC/R filed *FDIC etc. v. Goldrich et al.*, Case No. ED CV 94-0212 against Kaplan, Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow, and that the FDIC/R in that case made spurious and factually and legally insupportable claims for relief, thus causing the defendants in that case to expend substantial amounts in attorney fees and costs;

(2) the USA, FDIC/R and FDIC/C consciously and intentionally embarked upon a plan and strategy designed to coerce, extort and intimidate them into settling the litigation on terms demanded by Robbins and MEHP, but which terms did not produce any additional economic benefit to the USA, FDIC/R and FDIC/C;

(3) the Federal Defendants were motivated to do so because that was the only way they could recover any money on Robbins' restitution obligation and other liabilities to the Government and/or, on information and belief, that was the only way they could reward Robbins for his cooperation and assistance in the litigation and other criminal investigations;

(4) the Federal Defendants refused to consider Kaplan's alternative settlement proposal, although it would have produced the same economic benefit to them, and did so because of Robbins' insistence that any settlement must

provide that MEHP would be deemed always to have been a limited partner of Channel Gateway so as to avoid certain negative income tax liability consequences;

(5) the Federal Defendants implemented this strategy of coercion and intimidation by (a) using the U.S. Attorney's Office as counsel rather than using a private law firm, (b) listing, as part of their settlement demands, numerous state and federal laws which they claimed some of the defendants in the state and federal actions had violated in connection with unrelated events and transaction, which was done solely to intimidate defendants into settling to avoid a criminal investigation and its concomitant problems, and (c) threatening Kaplan with the filing of a civil penalty action against him, with potential penalties of $60 to $80 million, if he did not withdraw his opposition to the settlement, attempting to intimidate him by giving him Fifth Amendment warnings before beginning his deposition, and dismissing all claims against him.

The complaint contains five claims for relief, the first four of which are stated against every defendant, including the USA, and the last of which is stated only against the USA. The claims are as follow:

(1) for a judicial declaration that the settlement agreements entered into by defendants in 1995, as described above, are null and void and should be set aside and annulled, and for the other relief provided by Civil Code section 3439.07, e.g., the appointment of a receiver to take charge of the distributions from Channel Gateway to MEHP, which are subject to a lien in favor of the FDIC/R, on the ground that the settlement agreements were entered into by MEHP with the actual intent to hinder, delay and defraud its creditors in the collection of their claims against

MEHP, including but not limited to Kaplan's claims for fraud, breach of fiduciary duty and other tort claims;

(2) for a judicial declaration that the settlement agreements entered into by defendants in 1995, as described above, are null and void and should be set aside and annulled pursuant to California Civil Code, section 3439.04(b)[8], and for the other relief provided by Civil Code section 3439.07, e.g., the appointment of a receiver to take charge of the distributions from Channel Gateway to MEHP, which are subject to a lien in favor of the FDIC/R, on the ground that MEHP did not receive reasonably

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[8] California Civil Code section 3439.04 provides, in relevant part:

"A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose **before** or **after** the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows: ...

"(a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

"(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

"(1) Was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

"(2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due." (Emphasis added.)

equivalent value in exchange for granting a lien in favor of the Federal Defendants on all "Tier 1 Distributions" from Channel Gateway to it, and that, at the time the settlement agreements were entered into, MEHP was engaged in or about to engage in a business or transaction for which its remaining assets were unreasonably small; intended to incur or knew it would incur, debts beyond its ability to repay as they came due; was insolvent and/or became insolvent by reason of that assignment;

(3) for a judicial declaration that the settlement agreements entered into by defendants in 1995, as described above, are null and void and should be set aside and annulled pursuant to California Civil Code section 3439.05, and for the other relief provided by Civil Code section 3439.07, e.g., the appointment of a receiver to take charge of the distributions from Channel Gateway to MEHP, which are subject to a lien in favor of the FDIC/R, on the ground that MEHP did not receive reasonably equivalent value in exchange for granting a lien in favor of the Federal Defendants on all "Tier 1 Distributions" from Channel Gateway to it, and that, at the time the settlement agreements were entered into, MEHP was insolvent, or became insolvent as a result of entering into such agreements;

(4) for the imposition of a constructive trust against the Federal Defendants as to all monies they have received from Channel Gateway, with such money to be held by the Federal Defendants as involuntary trustees for the benefit of MEHP's creditors, including Kaplan; and

(5) for compensatory damages against the USA for conversion of Kaplan's 7 and ½ percent limited partnership interest in Channel Gateway as a result of the

agreements whereby defendants agreed that the value of MEHP's limited partnership interest in Channel Gateway was $15.2 million, and whereby they agreed that the foreclosure sale of MEHP's interest in Channel Gateway to WLBRSK Venture, in which Kaplan held a 50 percent interest, was null and void.

## II.
## ANALYSIS

### A. Kaplan's Fifth Claim Against Defendant USA Only, for Conversion, is Barred by the Federal Tort Claims Act's Jurisdictional Exceptions for Claims Arising Out of Interference with Contracts

Kaplan's fifth claim seeks compensatory damages from the USA for conversion of Kaplan's 7 and ½ percent limited partnership interest in Channel Gateway as a result of the 1995 agreements whereby defendants agreed that the value of MEHP's limited partnership interest in Channel Gateway was $15.2 million, and whereby they agreed that the sale of MEHP's interest to WLB-RSK Venture, in which Kaplan held a 50 percent interest, was null and void.

The USA moved to dismiss this claim on the grounds that: (1) it is barred under the Federal Tort Claims Act's (FTCA's) jurisdictional exception for claims arising out of interference with contract rights, 28 U.S.C. section 2680(h); and (2) it is barred by the discretionary function exception to the FTCA, 28 U.S.C. section 2680(a). Both grounds are valid.

The FTCA, 28 U.S.C. section 1346(b), waives the

United States' sovereign immunity by authorizing suits against it for damages for injury or loss of property, or personal injury or death, when such injury, loss or death have been caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of the employee's office or employment, if under such circumstances a private person would be liable to the claimant under the law of the place where the act or omission occurred. *Berkowitz by Berkowitz v. U.S.*, 486 U.S. 531, 535, 108 S.Ct. 1954, 1958, 100 L.Ed.2d 531 (1986). However, various statutes create exceptions to this otherwise broad waiver of sovereign immunity. One such exception applies here. It is any claim for tortious interference with a contract. 28 U.S.C. § 2680(h).

Kaplan, in an attempt to bring his fifth claim within the scope of the FTCA, alleges that the USA's "conversion" of Kaplan's "property" was accomplished by its alleged coercion of the other defendants into settling the action against them, ED CV 94-0212-RT, by agreeing to amend the Channel Gateway Partnership Agreement in such a way as to recognize that MEHP's partnership interest in Channel Gateway had not validly been foreclosed and sold to WLB-RSK Venture, and by amending the Channel Gateway Partnership Agreement to reflect that MEHP's right to distribution under that partnership agreement was restored. This effectively deprived WLB-RSK Venture (in which Kaplan had a 50 percent partnership interest) of the economic benefit it had received as the purchaser of the MEHP partnership interest at the foreclosure sale and as a direct result was a conversion of his interest in WLB-RSK Venture. In other words, the "conversion" was accomplished by forcing the settling defendants to change the terms of the Channel Gateway partnership agreement, to which Kaplan, a non-settling defendant, was a party and to

void the foreclosure and sale of MEHP's interest in Channel Gateway to WLB-RSK Venture.

These alleged facts clearly establish that Kaplan's claim for "conversion" of his "property" is really a claim for the government's interference with a contract between Kaplan and non-government, third parties, and that it is **not** a claim for destruction of property. See, e.g., *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 554 (9th Cir.1984) (contract merely showed that plaintiff owned the timber which was destroyed by a controlled fire conducted by federal employees, and claim was for loss of timber); *Nottingham, Ltd. v. U.S.*, 741 F.Supp. 1445, 1446-1447 (C.D.Cal. 1989) (government's release of money held in escrow account to third party, rather than to plaintiff who claimed ownership of funds, was conversion under California law, i.e., the wrongful exercise of dominion over personal property of another, not tortious interference with contract, there being no contract between plaintiff and third party with which the government interfered by releasing funds).

The United States has not waived its sovereign immunity from claims for interference with contract. 28 U.S.C. § 2680(h); *Mundy v. U.S.*, 983 F.2d 950, 952 (9th Cir. 1993). This court therefore lacks subject matter jurisdiction over such a claim. *Mundy v. U.S.*, 983 F.2d at 952, *supra*. Furthermore, there does not appear to be, nor does Kaplan suggest, any basis upon which this lack of subject matter over the fifth claim could be cured by amendment of Kaplan's complaint. For this reason alone, Kaplan's fifth claim against the USA must be dismissed without leave to amend. In addition, for the reasons discussed below, the fifth claim, as well as claims one through four, must also be dismissed because they fall within the discretionary function exception to the FTCA's waiver of sovereign immunity

**B. Kaplan's First, Second, Third, Fourth and Fifth Claims Are All Barred by The FTCA's Jurisdictional Exception for Claims Based on Conduct Which Falls Within the Discretionary Function Exception to the FTCA**

Kaplan's first, second, third, fourth and fifth claims are based on (a) the Federal Defendants' alleged coercion of Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow into entering into the settlement agreements by (1) filing Case No. ED CV 94-0212, (2) using the U.S. Attorney's Office as counsel rather than using a private law firm, (3) listing, as part of their settlement demands, numerous state and federal laws which they claimed some of the defendants in the state and federal actions had violated in connection with unrelated events and transaction, and (b) the Federal Defendants' alleged attempted coercion of Kaplan to enter into such agreements by (1) the above noted actions, plus (2) threatening Kaplan with the filing of a civil penalty action against him if he did not withdraw his opposition to the settlement, (3) giving Kaplan Fifth Amendment warnings before beginning his deposition, and (4) dismissing all claims against Kaplan.

The USA and FDIC/C moved to dismiss these claims on the ground that they are barred by the discretionary function exception to the FTCA, 28 U.S.C. section 2680(a).

28 U.S.C. section 2680(a), like 28 U.S.C. section 2680(h), limits the FTCA's waiver of immunity from suit. Section 2680(a) creates an exception to the Act's waiver of immunity for claims based on a federal employee's or federal agency's exercise or performance of, or failure to exercise or perform, a discretionary function or duty. This exception

applies when (1) the government employee or agency taking the challenged action has the power, pursuant to statutes, regulations or policy, to exercise judgment or choice in taking the action, and (2) the judgment or choice to be made is of the kind that the discretionary function exception to the waiver of immunity was designed to shield, i.e., if the governmental action challenged in the case involves the permissible exercise of policy judgment. *Berkowitz by Berkowitz v. U.S.*, 486 U.S. at 536-537, 108 S.Ct. at 1958-1959, *supra*.

The discretionary function exception clearly bars Kaplan's first through fifth claims. The first, second, third and fourth claims are all based on litigation and/or settlement-related actions taken by the Federal Defendants for the purpose of recovering monies owed to a federally-insured financial institution, Independence. USA's and FDIC/C's decisions in how best to recover Independence's assets, by threat of litigation, litigation and/or settlement of litigation are within the power of the USA and FDIC, and such decisions clearly rest within such agencies' sound discretion. See. e.g., 12 U.S.C. § 1819(a); 5 U.S.C. § 901; 28 U.S.C. §§ 516, 517, 518; 28 C.F.R. §§ 0.160-0.172; *U.S. v. California* 332 U.S. 19, 27, 67 S.Ct. 1658, 1662, 91 L.Ed. 1889 (1947); *Swift v. U.S.* 276 U.S. 311, 331-332, 48 S.Ct. 311, 317, 72 L.Ed. 587 (1928); Moore v. Valder, 65 F.3d 189, 197 (D.C.Cir.1995); *Gray v. Bell*, 712 F.2d 490, 505-506, 512-516 (D.C.Cir. 1983); *Smith v. U.S.*, 375 F.2d 243, 248 (5th Cir. 1967). No claim based on the exercise of such discretion will lie, even if the discretion was abused. *See, e.g., United States v. Gaubert*, 499 U.S. 315, 327-328, 111 S.Ct. 1267, 1275, 113 L.Ed.2d 335 (1991); *Gray v. Bell*, 712 F.2d at 513-516; *F.D.I.C. v. F.S.S.S.*, 829 F.Supp. 317, 322 (D.Alaska 1993); *Brooks v. United States*, 152 F.Supp. 535, 536 (S.D.N.Y. 1957).

Kaplan contends that under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., (the APA), this court has jurisdiction to review the actions taken by the Federal Defendants in connection with litigating and settling the Independence-related matters. However, agency litigation and settlement decisions are not reviewable under the APA. *See e.g., Vander Zee v. Reno*, 73 F.3d 1365, 1368 (5th Cir. 1996);[9] *F.D.I.C. v. F.S.S.S.*, 829 F.Supp. 317, 322, *supra*. Kaplan's contention that he does not seek review of the Federal Defendants' "actions," i.e., their litigation and settlement decisions, nor of any related internal regulations, and that instead he merely seeks the non-monetary remedies of injunctive, declaratory relief and appointment of a receiver authorized by California law related to fraud on creditors (Opposition at 13:19-14:10) is specious; the basis on which he seeks such remedies would **require** the court to review the actions which, in fact, are not subject to judicial review.[10]

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[9] Although the court of appeal did not reach this issue, the district court did.

[10] Kaplan also contends that the discretionary function exception cannot apply to insulate from liability the "tortious conduct" engaged in by the government attorneys to settle the Independence-related litigation. This contention is based on two premises: that Kaplan's complaint alleges extortionate threats barred by Rule 5-100 of the Rules of Professional Conduct of the California Bar and that the complaint alleges a tort, i.e., conversion. Neither premise is correct.

Kaplan also contends that Case No. ED CV 94-0212-RT was really nothing more than a collection action, and that as such, the actions which the government attorneys could take to settle it were restricted by internal regulations of the

Furthermore, there does not appear to be, nor does Kaplan suggest, any basis upon which these four claims could be amended so as to evade the bar of section 2680(a), and therefore such claims must be dismissed without leave to amend as to USA and FDIC/C.

The fifth claim, for "conversion," also is based on allegations that, as part of the settlement by the Federal Defendants of litigation against Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow, the USA coerced Goldrich, Snyder, Kest, Swimmer, SME, Channel Gateway and Breslow into amending the Channel Gateway Partnership Agreement to fulfill one of the settlement terms, to wit, that the foreclosure and sale of MEHP's limited partnership interest in Channel Gateway to WLB-RSK Venture be set aside. As discussed above, the USA has power pursuant to statute to make decisions about the acceptable terms for settlement of litigation, and such decisions are within the USA's sound discretion. *See, e.g., United States v. Gaubert*, 499 U.S. at 327-328, 111 S.Ct. at 1275; Gray v. Bell, 712 F.2d at 513-

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Department of Justice contained in section 3-10.120 of the U.S. Attorney's Manual, "Standards for Debt Collection Action." There are several problems with this contention. First, Case No. ED CV 94-0212-RT was not, and is not simply "a collection action." Second, Kaplan fails to point to specific regulations which any government attorneys allegedly violated in connection with this or related litigation. Third, violation of such internal regulations cannot form the basis for a claim against the government entity, at least in the absence of reasonable reliance and certain circumstances not present here. U.S. v. American Production Industries, Inc., 58 F.3d 404, 407-408 (9th Cir. 1995).

516; *F.D.I.C. v. F.S.S.S.*, 829 F.Supp. at 322; *Brooks v. U.S.*, 152 F.Supp. at 536. Thus, the fifth claim also is based on allegations of conduct protected from suit by the discretionary function exception to the FTCA, and it also must be dismissed without leave to amend on that basis as to the USA.

### C. The USA's and FDIC/C's Other Grounds for Dismissal

The court has considered the various other bases asserted by the USA and FDIC/C jointly and separately in support of their motion to dismiss but has not discussed them above because it has been able to decide the motions on the grounds discussed supra.[11]

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[11] The court does note that Kaplan's fourth claim is simply a request for a constructive trust, based on the allegations which form the basis for the first, second and third claims. A constructive trust is a remedy, not a claim or cause of action. Pacific Lumber Co. v. Superior Court, 226 Cal.App.3d 371, 378 (1990). Further, the remedy is only applicable if there is a viable claim for fraudulent conveyance against USA and FDIC/C by Kaplan. There is no such viable claim against USA and FDIC/C by Kaplan. Therefore, Kaplan would not be entitled to imposition of a constructive trust on any monies paid to them pursuant to the 1995 settlement agreements.

## IV.
## DISPOSITION

THEREFORE, IT IS ORDERED THAT:

Defendants United States of America's and Federal Deposit Insurance Corporation in its corporate capacity's motion to dismiss Kaplan's complaint as to the first, second, third, fourth and fifth claims is GRANTED WITHOUT LEAVE TO AMEND.

DATED: 01/22/97

/s/ ROBERT J. TIMLIN
ROBERT J. TIMLIN
United States District Court Judge

# APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**FILED**
U.S. Court of Appeals
Oct. 14, 1998
Cathy A. Catterson, Clerk

RAYMOND S. KAPLAN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity; FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Independence Bank; ALAN E. ROBBINS; MARINA EAST HOLDING PARTNERSHIP, a California limited Partnership; WARREN BRESLOW, individually and as Trustee of the Warren L. Breslow Trust; JONA GOLDRICH, individually and as Trustee of the Goldrich No.1 Trust; JEROME H. SNYDER, SOL KEST, individually and as Trustee of the Kest Trust No. 1, MILTON L. SWIMMER; CHANNEL GATEWAY, L.P., a California limited partnership; SNYDER MARINA ENTERPRISES, a California limited partnership,
Defendants-Appellees,

No. 97-55629
D.C. NO. CV 96-00159-RT

MEMORANDUM[1]

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[1] This disposition is not appropriate for publication and

Appeal from the United States District Court
for the Central District of California
Robert J. Timlin, District Judge, Presiding

Submitted October 8, 1998[2]
Pasadena, California

Before: Pregerson, D.W. Nelson and Thomas
Circuit Judges

After thoroughly reviewing the record and the briefs of the parties, we affirm the judgment of the district court.

AFFIRMED.

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may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[2] The panel finds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

# APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUT

**FILED**
U.S. Court of Appeals
Dec. 29, 1998
Cathy A. Catterson, Clerk

RAYMOND S. KAPLAN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity; FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Independence Bank; ALAN E. ROBBINS; MARINA EAST HOLDING PARTNERSHIP, a California limited Partnership; WARREN BRESLOW, individually and as Trustee of the Warren L. Breslow Trust; JONA GOLDRICH, individually and as Trustee of the Goldrich No.1 Trust; JEROME H. SNYDER, SOL KEST, individually and as Trustee of the Kest Trust No. 1, MILTON L. SWIMMER; CHANNEL GATEWAY, L.P., a California limited partnership; SNYDER MARINA ENTERPRISES, a California limited partnership,
Defendants-Appellees,

No. 97-55629
D.C. NO. CV 96-00159-RT

ORDER

Before: Pregerson, D.W. Nelson and Thomas
Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

# APPENDIX D

**5 U.S.C. §701(a)**

**§701. Application; definitions.**

(a) This chapter applies, according to the provisions thereof, except to the extent that --

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law....

**5 U.S.C. §702.**

**§702. Right of review.**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

# APPENDIX E

**Tort Claims Procedure § 2680**

**§ 2680. Exceptions.**

The provisions of this chapter and section 1346(b) of this title shall not apply to-

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provision of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United

States.

(g) [Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, liable, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising form the activities of the Tennessee Valley Authority.

(m) Any claim arising form the activities of the

Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.